No. 94-1039

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO
Case Nos. 94SA48 & 94SA128

BRIEF AMICUS CURIAE OF COLORADO FOR FAMILY VALUES
in support of the *Petitioners*

Robert K. Skolrood
Counsel of Record
Herbert W. Titus
Barry C. Hodge
The National Legal Foundation
6477 College Park Square
Suite 306
Virginia Beach, VA 23464
(804) 424-4242
Attorneys for Amicus Curiae Colorado for Family Values

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INTEREST OF AMICUS CURIAE

Colorado for Family Values (CFV) is the grassroots organization which initiated and campaigned for the passage of Colorado's Amendment 2. The opponents of Amendment 2 out-spent CFV almost 2 to 1 requiring CFV to rely heavily on citizen volunteers. During the campaign, the Denver television market, which covers approximately 75 percent of the voters in Colorado, refused to run CFV's advertisements. Despite that obstacle, CFV gathered approximately 85,000 signatures to place Amendment 2 on the ballot and hand-delivered over 700,000 information sheets about the amendment. When the voters of Colorado passed Amendment 2, the political pundits were astounded.

Given the role CFV played in the adoption of Amendment 2, CFV is naturally concerned about its continued vitality. CFV believes that states have the power to pass a wide variety of laws to protect the family and community morality, and CFV desires to protect the integrity of our constitutional system of government by ensuring that the original right of the people to limit their government is preserved.

The National Legal Foundation, CFV's counsel, assisted in drafting the language of Amendment 2 and participated as *amicus curiae* in this litigation at the state court level. The Foundation has also participated as *amicus curiae* in several federal and state cases and served as lead counsel in *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

Counsel of record for CFV is Robert K. Skolrood, the Foundation's Executive Director and General Counsel. Mr. Skolrood is licensed to practice in Illinois, Oklahoma, Virginia, and the District of Columbia, and is admitted to practice before the U.S. Supreme Court and numerous U.S. Circuit Courts of Appeal and District Courts.

STATEMENT OF THE CASE

This case comes to this Court on writ of certiorari. The relevant facts are uncomplicated.

In early 1991, a group of concerned citizens in Colorado Springs, Colorado formed Colorado for Family Values (CFV) to combat the passage of a local ordinance conferring minority status upon homosexuals. Because of CFV's grassroots campaign, the City Council rejected the ordinance.

Following this victory, CFV turned its attention to a movement in the State of Colorado to legitimize homosexuality through pro-homosexual municipal ordinances. Concerned with the effect that government legitimization of homosexuality would have on the traditional family and community morality, CFV began a campaign to put on the ballot an initiative which would prevent the state, its agencies, or political subdivisions from granting special protection to homosexuals.

On August 27, 1991, CFV submitted to the Secretary of State an initiative amendment to the Constitution of the State of Colorado. Later designated Amendment 2, the proposed initiative, if enacted by a vote of the people, would prohibit state and local governments from enacting, adopting, or enforcing "any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination." COLO. CONST. art. II, § 30b (Amendment 2).

In May 1992, CFV presented to the Colorado Secretary of State petitions from the required number of qualified voters to present Amendment 2 to the electorate. The secretary placed the initiative on the ballot.

Despite refusals to air CFV political advertisements which placed the

initiative at a disadvantage, on November 3, 1992, pursuant to Article II, § 2 of the State Constitution, the People of Colorado adopted Amendment 2 by a vote of 813,966 to 710,151 (53.4% to 46.6%).

On November 12, 1992, the Respondents sought an injunction in Denver District Court to prevent the enforcement of Amendment 2. The District Court granted a preliminary injunction. *Evans v. Romer*, 60 Empl. Prac. Dec. (CCH) ¶ 41,998 (Colo. Dist. Ct. 1993). On appeal, the Colorado Supreme Court affirmed, concluding that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution unless it could be proved that Amendment 2 was a necessary means to achieve a compelling state interest. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), *cert. denied*, 126 L.Ed.2d 365 (1993) (*Evans I*). On remand, the trial court ruled that Amendment 2 did not meet the standard of strict scrutiny. *Evans v. Romer*, 63 Empl. Prac. Dec. (CCH) ¶ 42,719 (Colo. Dist. Ct. 1993). On appeal, the Colorado Supreme Court again affirmed. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 130 L.Ed.2d 1061 (1995) (*Evans II*).

To reach this result, the Colorado Supreme Court created a new substantive right out of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. It described this new right as the "fundamental right to participate equally in the political process," and then held that Amendment 2 violated this right by fencing Respondents out of the ordinary political processes. *Evans I*, 854 P.2d at 1282-85. In other words, the Colorado Supreme Court ruled that the Equal Protection Clause guaranteed Respondents the right to take the homosexual rights political agenda before the people's elected representatives and that the people of Colorado could not by constitutional law limit Respondents in their effort to win support for that agenda.

SUMMARY OF ARGUMENT

The Respondents made no claim below that "gay men, lesbians, and bisexuals" constitute a suspect class protected from discrimination by the Fourteenth Amendment's Equal Protection Clause. *Evans I*, 854 P.2d at 1275. Nor could they have in light of this Court's opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986).[1]

Instead, Respondents claimed that the Equal Protection Clause guaranteed to them the right to take their homosexual rights agenda to the people's representatives unencumbered by constitutional limitation. The Colorado Supreme Court stated:

> We conclude that the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons must be subject to strict judicial scrutiny.

Evans I, 854 P.2d at 1282.

This ruling is both unprecedented and astounding.

As for precedent, the Colorado Supreme Court disregarded this Court's instructions not to create substantive "fundamental rights" out of the Equal Protection Clause. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Further, the Colorado court disregarded the limits that this Court has placed upon the fundamental right to vote. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *City of Mobile, Alabama v. Bolden*, 446 U.S. 55 (1980) (plurality); *Davis v. Bandemer*, 478 U.S. 109 (1986) (plurality). Finally, the Colorado court disregarded this Court's consistent rulings requiring proof of racial discrimination when specific issues are removed from the ordinary political processes. *Hunter v. Erickson*, 393 U.S. 385 (1969); *James v. Valtierra*, 402 U.S. 137 (1971); *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982); *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527 (1982).

The Colorado Supreme Court's decision is astonishing because it has, in effect, used the Equal Protection Clause to elevate the political agenda of a special interest group above the inherent right of the people to organize and constitute their government in accordance with the rule of law.

Such an extravagant, indeed reckless, reading of the Equal Protection Clause is neither supported by the constitutional text nor permissible under this Court's relevant precedents. The opinion of the Colorado Supreme Court should be reversed.

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1 *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 & n.6 (9th Cir. 1990); *Woodward v. United States*, 871 F.2d 1068, 1075-76 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied sub nom., Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

ARGUMENT

I. Introduction

From the time of the founding of the United States of America to the present, the People of this nation, and of the 50 constituent states, have exercised their inherent right to limit the powers of their elected representatives by superior paramount law, the written constitution. Chief Justice John Marshall described this right as the People's "original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). He further asserted that this right was "the basis on which the whole American fabric has been erected." *Id.*

It is, wrote Marshall, the People's "original and supreme will [that]

organizes the government, and assigns to different departments their respective powers." *Marbury*, 5 U.S. (1 Cranch) at 176. It is, he continued, the purpose of a written constitution to "define" and "limit" those powers so as to impose a "superior paramount law" binding upon all departments of government. *Id.*

These words, penned by the great chief justice in the seminal *Marbury* case, affirmed a right of the People of the United States which was recognized previously in the Preamble of the United States Constitution[2] and in the nation's Great Charter, the Declaration of Independence. The Declaration stated the principle as a universal one, established by "the laws of nature and of nature's God" that:

> [G]overnments are instituted among men, deriving their just powers from the consent of the governed, that . . . it is the right of the people to alter . . . [any form of government] . . . organizing its powers in such form, as to them seem most likely to effect their safety and happiness.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

This universal right of the People applies equally to the People of the States, as to the People of the United States. Both before and after the ratification of the United States Constitution, the People of each of the 50 states have exercised this right by constituting their own government, setting such limits on those governments as they will for their own peace, safety, and happiness.

The State of Colorado is no exception. Congress, in the act which enabled Colorado to join the Union, recognized the right of the people of Colorado to constitute the government of their state. Colorado

2 "WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. CONST. PREAMBLE.

Enabling Act, 1A COLO. REV. STAT. (1980). Section 4 of the Act provided that the state constitution be "republican in form, and make no distinction in civil or political rights on account of race or color . . . and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

The Colorado Constitution, in turn, described this right of the People in Section 2 of its Bill of Rights:

> All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

COLO. CONST. art. II, § 1.

On November 3, 1992, the People of Colorado exercised this right, as the People of the United States and of the other 49 states have done for over two hundred years. By popular vote, they amended the Colorado State Constitution, forbidding their elected representatives from passing any law making homosexual, lesbian, or bisexual conduct or orientation the basis for a "protected status" or a "claim for discrimination."

But the courts of Colorado have denied the People this right to limit the power of their elected representatives. The Colorado Supreme Court has ruled that this foundational right has been superseded by a superior "fundamental right to participate equally in the political process."

This novel "fundamental right" is unprecedented. Chief Justice Rovira, writing for the majority, could not find it in the original Constitution or in the Declaration of Independence. *See Evans I*, 854 P.2d at 1276 n.8. Nor could he find it in any 'fundamental rights' opinion written by this Court or by any other court. To the contrary, he admitted that every voting rights case upon which he relied "addressed entirely distinct questions and constitutional problems from those presented here." *Evans I*, 854 P.2d at 1278.

But this did not deter him and his colleagues. Driven by a statement extrapolated from a single book written by a law professor and a student note published in the Harvard Law Review,[3] Chief Justice Rovira reinterpreted this Court's voting rights and race cases and crammed a new fundamental right into the Equal Protection Clause. He did so notwithstanding his own admission that the case before him fit "none of th[e] . . . three categories of [voting] cases" upon which he relied. *Id.* Further he did so relying upon precedents that this and other courts have clearly limited to cases involving racial discrimination. *Id.* at 1296-1300 (Erickson, J., dissenting).

Undeterred by these precedents, and ignoring this Court's clear instruction in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) not to use the Equal Protection Clause to create new substantive rights, the Colorado Supreme Court did just that -- it fashioned a new substantive right from the Equal Protection Clause. Armed with this new "right," the Colorado Supreme Court denied the original right of the People of Colorado to remove certain subjects and policy choices from the political process by superior law.

This ruling is contrary to the time-honored principle that America is a nation of laws and not men. The Court below substituted its own view of the fundamental principles upon which this nation was founded for those actually embraced by the People in the Declaration of Independence, in the United States Constitution, in the Colorado Enabling Act, and in the Colorado State Constitution. The Colorado Supreme Court placed itself above the People -- a grave error that must be reversed.

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3 *Evans I*, 854 P.2d at 1276. The student note has nothing to do with the issue in this case. It deals with political parties and political candidates. Note, *Developments in the Law: Elections*, 88 HARV. L. REV. 1111, 1121 (1975).

II. Amendment 2 Does Not Infringe Upon Any Fundamental Right

A. The Right Of The People To Amend Their State Constitution Is Guaranteed By Article IV, Section 4 Of The United States Constitution

Article IV, Section 4 of the United States Constitution "guarantee[s] to every State in this Union a Republican Form of Government." James Madison, in Federalist No. 39, at 241 (Clinton Rossiter ed., 1961), defined a republic to be "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior."

In a republic, the right of the People to limit the power of their government is exercised by adoption of a written constitution. In his *Rights of Man*, Thomas Paine wrote:

> A constitution is not the act of a government, but of a people constituting a government; and government without a constitution, is power without right.

PHILIP S. FONER, THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE 375 (1974).

In his chapter on constitutions, Paine recounted how the governments of the original 13 states were established. Using Pennsylvania as his example, Paine documented how that state government was formed by the people through representatives commissioned for that purpose. This was accomplished by means of a written constitution containing, among other things, "the form which the Government should have, and the powers it should possess . . . the manner in which elections should be conducted, and the proportion of representatives to the number of electors." *Id.* at 377.

And so it has continued in the decades following as new states have entered the Union. The people of each state have exercised their

inherent authority to constitute the government for their state. As Thomas Cooley pointed out in his monumental work on state constitutional law:

> The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority. They have created a national Constitution, and conferred upon it powers of sovereignty over certain subjects, and they create State governments upon which they confer the remaining powers of sovereignty, so far as they are disposed to allow them to be exercised at all.

COOLEY, CONSTITUTIONAL LIMITATIONS 28 (Spec. ed. 1987).

By this authority, the people have formed constitutions that "tie up alike their own hands and the hands of their agencies; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to these fundamental laws." *Id.* Even the right to participate in the ordinary processes of government has been determined by the constitution which in many instances has imposed significant limitations. *Id.* at 28-30.

What Paine and Cooley recognized is fundamental. A government cannot exist until it is constituted by the people. The constitution determines what rights a citizen will have to participate in the process of government. The right to vote, or the right to take a particular policy issue to one's elected representatives depends, in the first instance, upon the state constitution. Therefore, the right to constitute a government and to alter that constitution takes precedence over the right of anyone to participate in the processes of government. The latter right is not primary, but subordinate to the original right of the people to form a government.

B. Amendment 2 Does Not Conflict With Any Particular Provision Of The United States Constitution

This original right of the People of each State to constitute their government is limited by the United States Constitution only "in those particulars in which" a state constitution and the national constitution "would come in conflict." COOLEY, CONSTITUTIONAL LIMITATIONS at 21. Thus, the People of a state have no power to authorize any state or local official to "provide for titles of nobility, or . . . to violate the obligation of any contract, . . . [or to] exercise any power expressly or impliedly prohibited to the States by the Constitution of the Union." *Id.* at 33.

The very purpose of these limitations -- and others like them -- in the national constitution was to remove certain policy choices from a state's ordinary political processes. The people of any state who favored such policies were required to comply with the constitutional amendment process provided for in Article V of the United States Constitution in order to pursue their policy objectives.

When the people of Colorado passed Amendment 2, they were simply following this pattern. They placed the question of special legal protection for homosexuals, lesbians and bisexuals outside the authority of their elected representatives. Those who supported such protection were required to secure an amendment to the state constitution.

The Colorado Supreme Court acknowledged that there is nothing in the United States Constitution that guarantees legal protection from discrimination to homosexuals, lesbians, and bisexuals. *See Evans I*, 854 P.2d at 1285. Thus Amendment 2 cannot be found in conflict with any national constitutional provision guaranteeing such substantive protection.

Notwithstanding the lack of substantive constitutional protection from discrimination, the Colorado Supreme Court ruled that the Equal Protection Clause guarantees proponents of such protective legislation

access to their elected representatives. But there is nothing in either the Equal Protection Clause or in any other provision of the United States Constitution that ensures such special interest group access.

This Court in *Rodriguez* laid to rest any notion that the Fourteenth Amendment's Equal Protection Clause gave authority to the Court to devise equality rights based upon political, economic, or social assessments. The Court stated that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Rodriguez*, 411 U.S. at 33. Indeed, to mount an equal protection challenge alleging violation of a substantive right, a claimant must point to some right found explicitly or implicitly in some provision of the U.S. Constitution *other than the Equal Protection Clause of the Fourteenth Amendment itself. See id.*

Having acknowledged that the United States Constitution does not require a state to protect persons from discrimination on the basis of sexual orientation, there is no proof that Amendment 2 conflicted with any particular provision in the national constitution. Therefore, the People of the State of Colorado were within their right to determine "to what extent private rights shall be required to yield to the general good." COOLEY, CONSTITUTIONAL LIMITATIONS at 33.

C. The Equal Protection Clause Requires Only Uniform Treatment Of Similarly Situated Voters

Prior to the adoption of Amendment 2, the People of Colorado had placed a number of subjects and policy choices beyond the powers of their elected officials. For example, Article XVI, § 2 of the Colorado State Constitution requires the general assembly to "prohibit the employment in the mines of children under twelve years of age." Those who would desire to employ such children in the mines cannot take that policy objective to any state or local official. They must secure a constitutional amendment repealing the prohibition. Similar limitations are imposed on other special interest groups by the Colorado State Constitution in areas ranging from lotteries, Article XVIII, § 2, to

homestead exemptions, Article XVIII, § 1.

Regarding such matters, individuals and groups have access to the democratic process for amending the state constitution. After the adoption of Amendment 2, those who favor special rights for homosexuals, lesbians, and bisexuals are in no different position than any other group seeking a policy goal that has been forbidden by the state constitution. Those favoring laws protecting sexual orientation, then, have not been denied by Amendment 2 the right to participate equally in the political process.

While the process of constitutional amendment differs from the process of legislative enactment, the Equal Protection Clause does not guarantee any particular democratic process. As Chief Justice Earl Warren stated in *Kramer*:

> [T]he effectiveness of any citizen's voice in governmental affairs can be determined only in relationship to the power of other citizens' votes. For example, if school board members are appointed by the mayor, the district residents may effect a change in the board's membership or policies through their votes for the mayor. Each resident's formal influence is perhaps indirect, but it is equal to that of other residents.

Kramer, 395 U.S. at 627 n.7 (citations omitted).

So it is after Amendment 2 in Colorado. Those favoring special rights for homosexuals, lesbians, and bisexuals are now, for example, similarly situated with those favoring tax support for religious schools. *See* COLO. CONST. art. IX, § 7. Neither may accomplish their public policy goals by way of the ordinary legislative process. However, both may achieve those goals through the constitutional amendment process.

This is all that the Equal Protection Clause requires in fundamental rights cases. As Chief Justice Earl Warren wrote in *Reynolds*: "[T]he

concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Reynolds*, 377 U.S. at 565.

The proponents of gay rights legislation stand in the same relation to their government officials as do a number of other groups that favor certain public policy goals. They cannot use the Equal Protection Clause to obtain a *special* right to take their policy agenda to their state and local officials unencumbered by constitutional limitation.

III. Amendment 2 Does Not Unconstitutionally Discriminate Against Any Individual Or Group

A. Disparate Impact Alone Is Insufficient To Establish An Equal Protection Violation

Respondents claim that they are exempt from the equality principle that applies in the ordinary fundamental rights case because Amendment 2 removes an issue important to them, an alleged minority group, from consideration via the normal political process. *See Evans I*, 854 P.2d at 1272 n.2, 1273-74. The Colorado Supreme Court affirmed. It ruled that the Equal Protection Clause allowed the people of the state to "withdraw antidiscrimination issues as a whole from state and local control," but prohibited the people from singling out "one form of discrimination and remov[ing] its redress from consideration by the normal political processes." *See id.* at 1285.

In so ruling, the Colorado Supreme Court employed an erroneous equal protection standard. It made no finding that the People of Colorado purposed, by the enactment of Amendment 2, to discriminate against homosexuals, lesbians, or bisexuals. Nor did it make any finding that the supporters of Amendment 2 acted out of malice or prejudice towards homosexuals, lesbians, or bisexuals. It simply found that:

> Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden -- no other group's ability to participate in the political process is restricted and encumbered in a like manner. Such a structuring of the political process undoubtedly is contrary to the notion that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."

Evans I, 854 P.2d at 1285 (citation omitted).

Even in cases of alleged discrimination against a constitutionally suspect class, this Court has consistently held that an equal protection claim cannot be proved by a discriminatory impact alone. *Washington v. Davis*, 426 U.S. 229, 239, 242-45 (1976). This same rule applies even when the discriminatory impact burdens a clearly recognized fundamental right guaranteed by the Equal Protection Clause. *Id.* at 240. Thus, this Court has consistently held that the right to vote is not infringed by any state law or policy solely because it has a discriminatory impact on an identifiable class of voters, suspect or otherwise. *City of Mobile, Alabama v. Bolden*, 446 U.S. 55 (1980) (plurality); *Davis v. Bandemer*, 478 U.S. 109 (1986) (plurality).

The Colorado Supreme Court extracted quite a different principle from this Court's voting rights cases. It ruled "that laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest." *Evans I*, 854 P.2d at 1279. But this Court has never adduced such a principle from its voting cases. To the contrary, it has rejected it.

In *Bolden* the claimant voter contended that the city's at-large electoral system unequally burdened the city's substantial minority black population. He claimed that the Equal Protection Clause commanded single-member district elections in order for minority blacks to achieve a

meaningful voice in the city's governmental affairs.

Dissenting Justice Thurgood Marshall, using language much like that of the Colorado Supreme Court, agreed. He found "a fundamental right to equal electoral participation that encompasses protection against vote dilution." *Bolden*, 446 U.S. at 114 (Marshall, J., dissenting). And he found evidence of vote dilution because the at-large system "effectively fenced out" an identifiable group from the political process. *Id.* at 122.

This Court rejected Justice Marshall's open-ended interpretation of the voting rights cases. *Bolden*, 446 U.S. at 75-80 (plurality). Instead, since *Bolden*, this Court has required proof of invidious discrimination against a constitutionally protected minority if a claimant were to succeed in striking down a particular electoral practice that diluted minority voting strength. *See Rogers v. Lodge*, 458 U.S. 613 (1982).

Had the court below paid attention to these precedents, it could not have transformed cases where such invidious discrimination had been proved into precedents establishing a fundamental right to participate equally in the political process. But it did just that on the strength of its revisionist views of the voting cases. *See Evans I*, 854 P.2d at 1278-79.

B. There Is No Proof Here Of Purposeful Discrimination Against A Racial Or Other Constitutionally Suspect Class

From *Reitman v. Mulkey*, 387 U.S. 369 (1967), to *Hunter v. Erickson*, 393 U.S. 385 (1969), to *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), this Court has been solicitous of claims that the People of a state have acted in a way designed to prejudice a racial minority. Under the "suspect class" branch of Equal Protection doctrine, this Court has applied strict scrutiny only upon proof of such invidious discrimination. But it has refused to apply such scrutiny to cases where the offer of proof fell short of implicating a protected suspect class. *James v. Valtierra*, 402 U.S. 137 (1971); *Gordon v. Lance*, 403 U.S. 1 (1971).

Taking *Hunter*, *Gordon*, and *Seattle School District*,[4] the court below concluded that they stand for the proposition that the Equal Protection Clause "protects the fundamental right to participate in the political process, and that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict scrutiny." *Evans I*, 854 P.2d at 1282 (footnote omitted). The Colorado justices extracted from these cases a principle that this Court has explicitly rejected.

Had the Colorado Supreme Court merely considered this Court's opinion in *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527 (1982), it would have discovered that none of this Court's justices asserted that *Hunter* and *Seattle School District* stood for any proposition other than one based upon race. Justice Powell in his majority opinion said this about *Hunter:*

> In Hunter the Court invalidated a city charter amendment which placed a special burden on racial minorities in the political process. The Court considered that although the law was neutral on its face, "the reality is that the law's impact falls on the minority." In light of this reality and the distortion of the political process worked by the charter amendment, the Court considered that the amendment employed a racial classification despite its facial neutrality. In this case the elements underlying the holding in Hunter are missing.

Crawford, 458 U.S. at 537 n.14 (citations omitted).

Even dissenting Justice Thurgood Marshall did not disagree with this characterization of *Hunter*:

> California's Proposition I works an unconstitutional reallocation of state power by depriving California

4 *See Evans I*, 854 P.2d at 1279-82.

> courts of the ability to grant meaningful relief to those seeking to vindicate the State's guarantee against de facto segregation in the public schools. Despite Proposition I's apparent neutrality . . . . [it] is sufficiently "racial" to invoke the Hunter doctrine.

Crawford, 458 U.S. at 554-55 (footnote omitted).

Having conceded that a suspect classification was not an issue,[5] the court below disqualified *Hunter* and its progeny from further consideration under the Equal Protection Clause. Not only is this true because this Court has never read *Hunter* to apply outside of the racial context, but any broader reading of it will undermine the very rule of law that this Court is duty bound to protect.

IV. The Equal Protection Clause Does Not Guarantee Any Fundamental Right To Participate Equally In The Political Process

A. The Constitutionally Guaranteed Right To Vote Does Not Include A Right To Participate Equally In The Political Process

Prior to the ratification of the Fourteenth Amendment to the United States Constitution, this Court ruled that the judicial power of the United States did not extend to "the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision." *Luther v. Borden*, 48 U.S. (7 How.) 1, 41 (1849).

For years this Court turned away a number of constitutional challenges to state laws limiting the rights of individuals to participate in the state political process. *E.g.*, *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875). During the period from the nation's founding until *Baker v. Carr*, 369 U.S. 186 (1962), this Court would not take jurisdiction of such a claim, unless the litigant could point to a specific constitutional guarantee of the particular right claimed. *E.g.*, *Gomillion v. Lightfoot*,

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5 *Evans I*, 854 P.2d at 1275.

364 U.S. 339 (1960).

After *Baker*, this Court began to apply the Equal Protection Clause to limit the state's power over the voting rights of its citizens. First, it held that the Equal Protection Clause prohibited a State, even when acting through the People by constitutional amendment, from apportioning any legislative body on any basis but "one person/one vote." *Lucas v. Forth-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964). Later, this Court relied upon the Equal Protection Clause to strike down poll tax, property, and residency restrictions limiting a person's access to the franchise. *E.g.*, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

In all of these voting cases, the complainant voters alleged and proved that they were being *deprived of an equal opportunity to determine the make-up of a legislative majority.* And in all of these cases, this Court simply ruled that the Equal Protection Clause prevented the state from diluting a voter's influence by malapportionment of the legislative body or by invidious restraints upon access to the ballot. *Bolden*, 446 U.S. at 77-78 (plurality).

In contrast, this Court has never held that the right to vote cases require strict scrutiny whenever the people of a state place a constitutional limit upon the legislative powers of their elected representatives. But the Colorado Supreme Court did. It concluded that this Court's voting cases require that particular issues be subject to the power of elected representatives lest supporters of those issues be unable to seek redress "by the normal political processes." *Evans I*, 854 P.2d at 1285.

Sensing the revolutionary nature of its ruling, the Colorado Supreme Court attempted to limit its extension of the voting rights case precedents to those instances where "a targeted class" has been deprived of the fundamental right to "obtain[] legislative, executive, and judicial protection or redress from discrimination . . . [without having to obtain] the consent of a majority of the electorate through the adoption of a

constitutional amendment." *Evans I*, 854 P.2d at 1285.

The Colorado Supreme Court, then, attempted to limit its novel "targeted class" to "independently identifiable groups." *Id.* According to the Court, such a group cannot be defined solely by its identity with the policy or subject of the challenged amendment. The class, the court asserted, must be identifiable "independently" from that policy or subject. *Id.* at 1281-83.

But the Colorado justices were unable to stick to their own rule. When the court addressed whether "homosexuals, lesbians, and bisexuals" are an "independently identifiable group," it concluded that they were -- solely on the basis of the policy and subject matter embodied in Amendment 2:

> Amendment 2 expressly fences out an independently identifiable group. Like the laws that were invalidated in *Hunter*, which singled out the class of persons "who would benefit from laws barring racial, religious, or ancestral discriminations," Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden – no other group's ability to participate in the political process is restricted and encumbered in a like manner."

Evans I, 854 P.2d. at 1285 (citation omitted).

This is an astounding statement! It is simply not true that no "other identifiable group" is burdened as homosexuals, lesbians, and bisexuals have been by Amendment 2. For example, Article XVI, Section 2 of the Colorado State Constitution requires mine owners to amend the state constitution if they wish to employ children under twelve years of age. Article XVIII, Section 1 requires creditors to amend the state constitution if they wish the constitutionally required liberal homestead

and other debtor exemption laws to be strictly construed. Those who seek legislative sanction for lotteries or for pari-mutuel gambling, other than those permitted by Article XVIII, Section 2 and Section 9 must seek a constitutional amendment.

The point here is that the voting rights precedents must be confined to the limits set by this Court lest the Equal Protection Clause be construed in a way that is inconsistent with the right of the People to limit the power of their elected representatives. The Colorado Supreme Court's ruling clearly demonstrates the wisdom that this Court has shown in its numerous precedents limiting the right to vote.

B. Any Right To Participate In The Ordinary Political Process Must Be Limited By The Right Of The People To Limit The Power Of Their Representatives By Constitutional Law

Every constitutional limit upon the power of the people's representatives, whether federal or state, removes one or more policy issues from the ordinary democratic process by which public policy is determined. If the Colorado Supreme Court's decision is upheld by this Court, it could be used to invalidate the Bills of Rights in the United States Constitution as well as in every state constitution. For by definition the limits on government power in those constitutional documents foreclose democratically enacted policies forbidden by their terms. Just a few examples will suffice to prove this point.

This Court has held repeatedly that the First Amendment, as applied to the states via the Fourteenth Amendment, prohibits a state from supporting certain activities in pervasively religious schools. *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985). *Cf.* COLO. CONST. art. IX, § 7. Without question, this application of the Establishment Clause "fences out" an independently identifiable religious group from obtaining non-discriminatory access to public funding for the education of their children. According to the Colorado Supreme Court, the Equal Protection Clause would prohibit this as a denial of the minority religious group's "fundamental right to participate

equally in the political process."

This Court has also held that the First Amendment, as applied to the states via the Fourteenth Amendment, prohibits a state from enacting a "right of reply" statute requiring any newspaper that "assails" the character of a political candidate to print the candidate's reply. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Yet, this Court upheld a similar Federal Communications Commission (FCC) rule which applied to radio and television. *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969).

This Court recognized in *Tornillo* that its ruling would fall heavily upon minority party candidates, yet it refused to be swayed by arguments on their behalf. *Tornillo*, 418 U.S. at 251-52. The *Tornillo* ruling left the minority parties with only one remedy: to seek and obtain a constitutional amendment to permit "right of reply" statutes. In contrast, the *Red Lion* ruling left the normal political processes open.

According to the formula of the court below, the *Tornillo* ruling violates the Equal Protection Clause because it fences out an independently identifiable minority from going to the state legislature and obtaining protection from newspaper assaults upon their character. In contrast, the *Red Lion* ruling would withstand Equal Protection scrutiny, because minority political groups still have access to Congress and the FCC to achieve their goals.

The point of these two examples is simple. Any religious group has a religious identity that "transcends the mere support for a single political issue" such as seeking funds for its religious activities. Such an independently identifiable group, however, is fenced out of the normal political processes in obtaining such funds for its religious purposes because of the Establishment Clause. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971); *State of Oregon v. City of Rajneeshpuram*, 598 F.Supp. 1208 (D. Or. 1984).

Likewise, minor political candidates and their parties have identities

transcending their support for legislation limiting the freedom of the press through a right to reply statute. Yet, they cannot achieve relief except through the extremely burdensome process of obtaining an amendment to the Freedom of Press Clauses of the First Amendment and of the constitutions of the fifty states, including Colorado. *See* COLO. CONST. art. II, § 10.

The Colorado Supreme Court's attempt to limit its newly minted fundamental right of equal participation in the political process to "independently identifiable" groups fails. There is simply no means to corral it. If followed to its logical extent, the court's newly created right would swallow the Bill of Rights and all other limits placed upon the powers of legislative bodies contained in the United States and State Constitutions.

CONCLUSION

In his 1958 Oliver Wendell Holmes lectures at Harvard Law School, the distinguished jurist, Learned Hand, cautioned his fellow judges that they not abuse their power of judicial review by substituting their judgment for that of the people's legislative representatives. He reminded them that America's founders had chosen a government ruled primarily by the people, and not by a "bevy of Platonic Guardians" sitting on the bench. HAND, THE BILL OF RIGHTS 73 (1960).

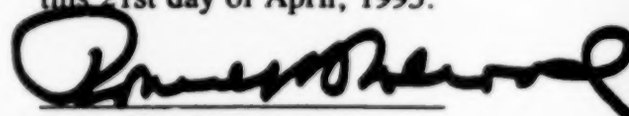
Judge Hand's admonition appears especially relevant here, where the people themselves -- not just their representatives -- have determined to resolve a disputed issue of policy. Even the Colorado trial judge, H. Jeffrey Bayless, acknowledged in this case that the role played by the people of Colorado was legitimate:

> [W]hat I saw was a group of Colorado citizens who wanted to present an initiative to the voters. They said we would like the voters of Colorado to look at this. So they acquired signatures. They presented things to the state government. They followed the political process, and they got it on the ballot. And they lobbied . . . for the passage of the Amendment . . . .
>
> There is absolutely nothing wrong with that. As a matter of fact, that is exactly in keeping with the political process that this country is based on. And this Court, should there be an attack on that process, would vigorously defend those persons who have been involved with that process, because they have followed exactly what democracy urges. As a matter of fact, at every election, what you hear is to the voters, "Get involved. Go to your caucuses. Vote." That's exactly what they have done. There's nothing suspect about that.

Evans v. Romer, 60 Empl. Prac. Dec. (CCH) ¶ 41,998, at 73,837 (Colo. Dist. Ct. 1993).

The problem here is that neither Judge Bayless nor the Colorado Supreme Court took this observation to heart. Rather, they succumbed to the siren song of judicial activism, substituting their own wisdom in the name of the constitution for that of the people. This is not consistent with the lawful exercise of judicial power or with the constitution itself. For the reasons stated herein, the decision of the Colorado Supreme Court should be reversed.

Respectfully submitted
this 21st day of April, 1995.



Robert K. Skolrood
Counsel of Record
Herbert W. Titus
Barry C. Hodge
Attorneys for *Amicus Curiae*
Colorado for Family Values
The National Legal Foundation
6477 College Park Square
Suite 306
Virginia Beach, VA 23464
(804) 424-4242